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U.S. Citizenship
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FILE: [REDACTED]
EAC 03 263 52933

Office: VERMONT SERVICE CENTER

Date: DEC 02 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides computer consulting and software services. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 21, 2000. The proffered wage as stated on the Form ETA 750 is \$67,500 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1997, gross annual income of \$700,000, no net income, and six current employees. In support of the petition, the petitioner submitted no supporting evidence.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 11, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted Form 1120S corporate tax returns for the petitioner for the years 2000, 2001 and 2002. The tax returns reflect the following information for the following years:

	2000	2001	2002
Net income	\$158,192	(\$727,693)	(\$1,103)
Current Assets	\$743,000	\$387,808	\$433,268

Current Liabilities	\$507,442	\$708,722	\$737,969
Net current assets	\$235,558	(\$320,914)	(\$304,701)

In addition, the petitioner submitted the tax returns for the petitioner's affiliate, [REDACTED], and a Portfolio Summary Review for Logistic Solutions covering November and December 2003.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 28, 2004, denied the petition.

On appeal, counsel asserts that the petitioner's high current liabilities should be discounted as the majority of the money listed under current liabilities is owed to the petitioner's affiliate, and will not be collected unless the petitioner has excess cash. The petitioner resubmits the evidence submitted previously.

Where the petitioner submits the initial evidence required under the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary any wages at any time. We note that the petitioner indicated on the Form I-1-40 petition that the position being offered was a new position.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner shows sufficient net income in 2000 to demonstrate its ability to pay the proffered wage in that year. Thus, at issue is the petitioner's ability to pay the proffered wage after 2000. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001 and 2002, according to the petitioner's federal tax returns as submitted, the petitioner shows a net loss and negative net current assets.

Any reliance on the assets of Logistic Solutions, Inc. would not be persuasive. As stated by the director, a corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

Nevertheless, the petitioner is not relying on the assets of [REDACTED]. Rather, counsel asserts that the large *current* liabilities listed as amounts due to the affiliate should be considered *long-term* liabilities as the affiliate will not collect unless the petitioner has excess cash. If it is counsel's assertion, however, that the amounts due to the affiliate are not current liabilities because the affiliates do not have formal agreements with each other, then the amounts due *from* the affiliate may not be considered current assets, especially in 2002 when Logistic Solutions shows a net loss. The amounts due from and to the affiliate in 2001 and 2002 impact the petitioner's current assets and liabilities as follows:

	2001	2002
Total current assets	\$387,808	\$433,268
Less due from affiliate	\$227,294	\$343,380
Amended current assets	\$160,514	\$89,888
 Total current liabilities	 \$708,722	 \$737,969
Less due to affiliate	\$691,138	\$702,452
Amended current liabilities	\$17,584	\$35,517
 Amended net current assets	 \$142,930	 \$54,371

Thus, even if we were to accept counsel's assertions, the petitioner is still unable to demonstrate an ability to pay the full proffered wage of \$67,500 in 2002. Regardless, counsel's implication that the tax returns submitted do not accurately reflect the petitioner's financial situation is not persuasive. Ultimately, counsel is requesting that CIS not consider the petitioner's current debt to its affiliate because the affiliate will not seek to collect on that debt if the petitioner lacks the ability to meet its obligation. Thus, counsel is acknowledging

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

that the petitioner is unable to meet its obligations to its affiliate. In fact, its obligation to its affiliate grew between 2001 and 2002. Thus, the financial picture painted by counsel is not one of a stable company with cash available to meet its obligations in addition to the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or subsequently. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.